United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7096

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P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

SAMUEL H. SLOAN,

Plaintiff-Appellant,

-against-

CANADIAN JAVELIN LTD., et al.,

Defendants-Appellees.

BRIEF FOR APPELLEES
CANADIAN JAVELIN LIMITED, BISON PETROLEUM & MINERALS LTD., CANADA PERMANENT TRUST COMPANY, WILLIAM M. WISMER and TECHNICAL ECONOMISTS, LTD.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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SAMUEL H. SLOAN,

Plaintiff-Appellant,

- against -

CANADIAN JAVELIN LTD., et al,

Defendants-Appellees.

----------X

Docket No. 75-7096

Cal. No. 335

BRIEF OF APPELLEES CANADIAN JAVELIN LIMITED, BISON PETROLEUM & MINERALS LTD., CANADA PERMANENT TRUST COMPANY, WILLIAM M. WISMER and PETROLEUM ECONOMISTS, LTD.

Statement

This is an appeal from the decision of the Hon. Dudley B. Bonsal, United States District Judge, Southern District of New York, dated May 30, 1974, and an order and final judgment dated June 7, 1974, which dismissed an amended complaint filed December 29, 1973 and, in addition thereto, all pending complaints with costs and with prejudice as to all defendants except Canadian Javelin Limited (CJV), John C. Doyle and William M. Wismer, and, as against

these, dismissed it without prejudice. The other relief granted by the order and final judgment is not relevant to this brief.

The decision of Judge Bonsal recites at length the history of this litigation by pro-se plaintiff Sloan. It points out that the last amended complaint so dismissed, containing 10 counts, 43 pages, 253 numbered paragraphs, and naming 48 defendants (SA-4), is the third filed complaint in this matter (SA 8-10) and the fourth prepared, including a "proposed amended complaint" served but not filed (SA-9). It recites that this complaint shows Sloan, a former registered broker-dealer (SA-2), to have held a substantial short position in shares of CJV (SA-3) when the price of that stock rose. The decision describes the price rise as being by reason of a series of overt acts, including allegedly false press releases, stockholders' letters, annual report, and publication of certain articles in the press (SA-4). Such description is most generous in favor of Sloan since the complaint is itself silent on any such causality and alleges no specific reasons for the price rise. The complaint alleges that Sloan was unable to cover his short position because of the conspiracy of

some defendants in not honoring his orders to buy (SA-4) and therefore instituted this suit for damages, claiming to have been a defrauded investor in connection with purchases and sales of such stock, without, however, showing in what respect any such specific purchase or sale was the result of any acts of defendants.

The first complaint (73 Civ. 3801), a brief document, contained 12 allegations against 9 defendants, demanding $150,000 damages (A-12). After motions were made to dismiss the first complaint, the second complaint was filed in a new action (73 Civ. 4403) naming 8 of the original 9 defendants, plus 24 new ones, containing 20 paragraphs, and demanding $170,000 of damages (A-16). Various defendants moved to dismiss the pending complaints. Sloan then served, but did not file, a third proposed amended complaint, naming 32 defendants, containing 41 paragraphs and demanding $7,170,000 damages. The Court granted Sloan leave to file a final amended complaint within 20 days of November 19, 1973, but none was filed within that period.

Belatedly, on December 29, 1973, Sloan filed a fourth amended complaint, 19 days after the expiration of his time

tc do so. By this time, the complaint had mushroomed to include 253 paragraphs, 48 defendants, and a demand for $7,213,000 of damages (A-69 - A-118). After filing this amended complaint, Sloan left for Iceland, knowing that a motion to dismiss was pending (A-128). Further motions to dismiss were made but he elected not to return to court for argument on those motions, instead sending a clerk to inform the Court that he would not return until February 11th because he was travelling in Europe (SA-15). Appellant offered no other excuse for failure to comply with the Court's order of November 18, 1973 (SA-13) which had granted the right to serve and file a fourth complaint.

On October 23, 1973, Sloan had represented in open court that he had no legal counsel because he could not find an attorney capable of handling this case (A-259). His extensive history of pro se litigation was taken into consideration by the Court below (SA-2).

The decision held that Sloan had had ample opportunity to frame a proper complaint (SA-17) but that even if the final amended complaint had been filed within the period directed by the Court, it would have been dismissed as to all

defendants except three, i.e., CJV, Doyle and Wismer, and would have been stayed as to these defendants pending final determination of an action against them by the Securities & Exchange Commission (SA-18). But, ruled the Court, in view of Sloan's failure to comply with the time requirements fixed by the Court, all pending complaints against defendants except those three, would be dismissed with prejudice, and, against them, without prejudice.

Although permitted by the Court to institute an action de novo against CJV, Doyle and Wismer, by filing a new complaint, complying with the requirements of the Federal Securities Law and the Federal Rules of Civil Procedure (SA-18), Sloan failed to do so but instead pursued this appeal. His admitted reason for not doing so may be found in his affidavit, sworn to June 4, 1974 - "A lawsuit against CJV, Doyle and Wismer would be a waste of time" (A-187).

The decision points out that Sloan is an experienced trader in the securities market (SA-16) who has had four opportunities to frame an adequate complaint (SA-16). Notwithstanding the proliferation both of allegations and defendants, and although in the course of extensive motion practice, Sloan became ever more and more educated to the defects in his

earlier pleadings, his last complaint was nevertheless found by the Court to continue to fail to meet the specificity requirements of Rule 9b, F.R.C.P. with respect to each defendant, such as, whether he relied on alleged false and misleading statements and reports, whether the alleged fraudulent statements were made in connection with a purchase or sale of a security by him, and whether the injuries complained of were in fact caused by the alleged fraudulent activities of the defendants. The decision cites copious authorities. It considers at length Sloan's claim and notes (SA-11) that under the last complaint filed, there is no showing that he was damaged by the alleged false press releases or alleged manipulative activities. It shows that, on the contrary, Sloan claims to have known all along that information disseminated by CJV and its officers was false but did not impart his knowledge to other potential investors, instead seeking to capitalize on the alleged fraud (SA-12).

In a memorandum submitted to the Court in opposition to motions to dismiss (A-184), Sloan stated: "The public based its reliance solely on the earnings report disseminated by Standard & Poor's Corporation. Plaintiff did not rely on these reports. He knew that they were wrong. This explains the fact

that he was a short seller of Javelin shares" (A-258). Thus, in one stroke, he negated reliance by the public on any acts of defendants other than Standard & Poor's and reliance by himself. His effort to expand on this claim by later stating in an affidavit that the information he relied upon was a UPI press release of June 20, 1973, although he was already short before it (A-202), does not help his position. The June 20 release was not alleged to have been issued by any defendants but emanated from the Panamanian Government. Thus, non-reliance on acts of the defendants is emphasized. The Court below therefore concludes that Sloan cannot be permitted to convert the alleged fraud of any defendants to his personal advantage under the Securities Act of 1933 or the Securities & Exchange Act of 1934.

The decision is predicated upon the multiple factors of Sloan's failure to plead a proper complaint after four efforts, the fact that his action is in any event barred by his concededly unclean hands and efforts to capitalize on alleged fraud, his failure to comply with the Court's order to file an amended complaint within the time allotted, his

deliberate absenting of himself from the United States at a time when he knew his last complaint was under attack, his efforts to delay the disposition of other actions, his putting multiple defendants to costly motion practice, his filing frivolous motions and unnecessary papers, his attempt to interfere with the prosecution of an action by the Securities & Exchange Commission and other like considerations.

Notwithstanding that Sloan, as pro se plaintiff, improvised legal procedures, served complaints that were not filed, filed a second complaint without leave of the Court, and treated complaints in two separate actions as if they were consolidated without leave to do so, he was afforded repeated opportunities to plead with particularity the alleged circumstances constituting fraud, as conceded at page 10 of his brief (Aiv-xiii).

Summary of Argument

Defendants CJV, Bison, Canada Permanent, Wismer and Technical Economists contend that the decision, order and judgment of the Court below were properly entered; Sloan clearly demonstrated, by the failure of his repeated efforts to plead a good cause of action, that there was no merit to his claim; Sloan showed no injury as a result of any of the alleged

acts set forth; he was admittedly a sophisticated investor and dealer-broker who claims to have known all the time that the information disseminated by CJV and its officers and published in financial media named as defendants was false; he attempted to capitalize on the alleged falsity by selling short but did not disclose his knowledge to other potential investors; he had full and repeated opportunities to plead but repeatedly failed to meet the requirements of specificity provided by Rule 9b F.R.C.P; his final complaint continued to fail to show that he relied on the alleged statements and reports, that these were allegedly made in connection with the purchase or sale of a security by him and that injuries were caused by activities of the defendants.

It will therefore be argued herein that the Court properly made its decision, order and judgment.

Argument

POINT I.

THE DECISION, ORDER AND JUDGMENT BELOW WERE PROPERLY GRANTED.

The suggestion at page 22 of Sloan's brief that the complaint was dismissed solely for failure to prosecute is

utterly erroneous. There was ample evidence of his disregard of the rules of the court and of its orders. The sheer quantity of paper work involved in this action, if performed by Sloan without legal help, on the one hand demonstrates such zeal, energy and familiarity with law as to, on the other hand, render inexcusable his failure to comply with the rules of the court. Nothing need be added to the recitation of the proceedings set forth at page iv of the joint appendix in order to show the extreme degree to which multiple parties and their counsel have been harrassed and prejudiced in this action. Sloan concedes at page 31 of his brief that "the clients of Diamond & Golomb can perhaps claim to having been put to substantial expense in the defense of this action...". This concession suffices to substantiate the claim of prejudice on the part of defendants CJV, Bison, Canada Permanent, Wismer and Technical Economists Ltd.

Rule 41b F.R.C.P. provides:

> "For failure of the plaintiff...to comply with... any order of the court, a defendant may move for dismissal of an action for any claim against him".

The Second Circuit Court of Appeals has held in Taub v. Hale, 355 F 2d 201, 202 (1966):

> "Under (Rule 41(b) and the inherent power of a court to dismiss for failure to prosecute, a District Court may, sua sponte, and without notice to the parties, dismiss a complaint for want of prosecution, and such dismissal is largely a matter of the judge's discretion".

The decision below cited Taub and, to the same effect, Link v. Wabash R. R.,370 U. S. 626 (1962); Redac Project 6426, Inc. v. Allstate Insurance Co., 412 F. 2d 1043 (2d Cir. 1969) 5. J. Moore, Federal Practice Par. 41.11-41.12 (2d ed. 1964). All these support the decision.

The Court of Appeals for the Ninth Circuit, in States Steamship Co. v. Philippine Air Lines, 426 F. 2d 803, 805 (1970) enumerated the elements to be taken into consideration by the court in considering dismissal, sua sponte:

> "(1) the (plaintiff's) right to a hearing on its claim, (2) the impairment of (defendants') defenses presumed from the unreasonable delay, (3) the wholesome policy of the law in favor of the prompt disposition of law suits, and (4) the duty of the (plaintiff) to proceed with due diligence."

In the case at bar, Sloan's excuse for not filing a complaint during the period between November 19th and December

10th, 1973, was that he was involved in a trial which commenced December 11 , (after the end of that period). Having left for Iceland after filing an amended complaint on December 9, 1973, in the face of a motion to dismiss, he deliberately did not return for argument January 14, 1974 on that and other motions to dismiss, advising the Court he would not return until February 11th.

The Court was eminently justified in treating Sloan's acts as deliberate failure to go forward during the period required. Yet, it is noteworthy that it did not, on those grounds, dismiss with prejudice against defendants CJV, Doyle and Wismer. The dismissal with prejudice against the other defendants is clearly related to the combination of facts which include, on the one hand, Sloan's failure to prosecute and comply with court order, and, on the other, his inability to demonstrate any sustainable cause of action whatever against them. Either ground alone sufficed.

While it is the position of defendants CJV and Wismer (defendant Doyle has not appeared here) that there is likewise no merit to any claim against them, they have not cross-appealed for dismissal on the merits. Sloan has made it clear

that he does not propose to proceed against them without the other defendants in the action since he maintains that "a lawsuit against CJV, Doyle and Wismer would be a waste of time" (A-187).

The dismissal of the complaint without prejudice is certainly no deprivation of First Amendment rights. The dismissal of the complaint with prejudice against the remaining defendants is based not only upon procedural questions, as Sloan's distorted view suggests, but upon the entire constellation of his improper, vexatious and harrassing procedures in conjunction with repeated inability to plead a non-dismissible cause of action, and his admitted efforts to take advantage of his own wrongful acts. Ignoring responsibility for his own behavior, Sloan translates the Court's position into a matter of personal rejection of him in stating: "Even if this court does not like me or my lawsuit...". The record shows that Sloan was afforded constant courtesies and permitted enormous latitude.

It is well settled that a dismissal for failure to prosecute will not be reversed on appeal except for abuse of discretion. Redac Project 6426, Inc. v. Allstate Insurance Co., supra. No such abuse of discretion was shown here.

POINT II

THE LAST AMENDED COMPLAINT IS INSUFFICIENT FOR FAILURE TO STATE A CLAIM.

Sloan's brief, at p. 43, admits that "after the original complaint was filed, defendant CJV moved to dismiss on several counts, including the grounds that Sloan had not relied on the allegedly false and misleading statements made by CJV. This was an appropriate argument in view of the prevailing case law in this circuit at that time." Sloan has not shown that the case law has changed but admits, at p. 44 of his brief, that he never relied on the truth and accuracy of the alleged false and misleading statements in deciding whether or not to buy or sell shares.

It is basic that a complaint which does not allege the particulars required by Rule 9 (b) F.R.C.P., showing what is alleged to constitute fraud, is insufficient as a matter of law.

Segal v. Gordon & Coburn Corporation of America (USCA 2d Circuit Aug. 3, 1972, appeal from S.D. N.Y.) 467 F 2d 602.

A civil action under Section 10(b) of the Securities Exchange Act of 1934 may be maintained only by a purchaser or a seller of a security.

Birnbaum v. Newport Steel Corp.
193 F 2d 461 (2nd Circuit) cert. den 343 US 956 (1952)

SEC v. National Securities
393 US 453, 21 L.Ed. 668, 89 S. Ct. 564

Iroquois Industries, Inc. v. Syracuse China Corporation, et al
417 F. 2d 963 (1969) (reh. denied Feb. 11, 1970)

Ashton v. Thornley Realty Co.
(SDNY May 1, 1972) 346 F. Supp. 1294, aff'd Feb. 1973 417 F. 2d 647

Haberman v. Murchison, et al
(USCA 2nd Circuit Oct. 30, 1972) 468 F 2d 1305

Drachman v. Harvey
(USCA 2nd Cir. Jan. 18, 1972) 453 F. 2d 722, rev. on hearing on grounds that purchaser seller requirement was satisfied, 453 F. 2d 736 (1972)

Appellant merely alleges that he was at all times a short seller of Javelin shares between January to August, 1973 and that he made numerous purchases and sales of such shares during this period. However, he fails to show a connection between any purchase or sale and any of the allegations of this complaint and specifies no date of sale or purchase.

There is no showing of reliance by Sloan, although it is well established that reliance is a necessary element of

a claim under Rule 10(b) 5.

Affiliated Ute Citizens of Utah v. United States, 406 US 128 (1972) 31 L.Ed. 2d 741, 92 S. Ct. 1456

List v. Fashion Port, Inc., 340 F 2d 457 (2d Cir. 1965) cert. den. 382 U.S. 811 (1965).

Affiliated Ute v. U.S., supra, holds that reliance must be shown where there is an affirmative duty to disclose. In List v. Fashion Port, supra, the Second Circuit Court of Appeals, in essence, limited the elimination of the requirement of reliance in cases of omission to those cases in which a fiduciary relationship exists.

Such is not the case here where Sloan predicates his basic position not on the silence of the defendants (none of whom can be considered fiduciaries in relation to a short-seller, outsider-speculator) but upon their alleged promulgation of affirmative statements, press releases and other alleged affirmative representations.

In Connolly v. Balkwill, 174 F. Supp. 49, 59 (N.D. Ohio 1959) affd. 279 F. 2d 684 (6 Cir. 1960), the Court stated:

> "Certainly the more reasonable view would seem to be that the duty to speak which is implicit in Rule X10b-5 arises in those circumstances where a fiduciary or quasi fiduciary relation exists, where confidence is reposed or influence acquired, where there is a justifiable expectancy of disclosure or reliance upon the superior knowledge of another and in other like circumstances. But it cannot be supposed that the rule imposes a duty to speak in all cases involving the purchase or sale of securities irrespective of [illegible] relations of the parties or the circumstances under which the transaction is consummated. Neither the express language of the rule nor its fair implications warrant such a construction".

There is no allegation in the complaint of a fiduciary relationship between Sloan and the defendants. Absent such fiduciary relationship, Sloan was required to separately allege and prove reliance. He has not only not claimed reliance but affirmatively disavowed any. He even alleges that the public relied solely on the earnings report disseminated by Standard & Poor's Corporation (A-184). Thus, he eliminates reliance by the public upon any acts of defendants other than Standard & Poor's.

Nor is there any allegation of causality in the amended complaint. Paragraph 175 of the complaint simply says that during July, 1972, Javelin experienced a sharp rise in price

when the rest of the market was declining; it does not allege causality. The Court correctly held that there was no showing of damage to Sloan in consequence of any alleged specific acts. Sloan concedes, at page 56 of his brief:

> "Any attempt to tie a particular transaction to a particular press release would have no relevance".

Moreover, paragraph 178 of the complaint alleges that Sloan does not know where he stands with respect to Javelin. Whatever his rationalizations, Sloan has failed to comply with the requirements of Rule 9 (b) F.R.C.P. to state with particularity the circumstances constituting fraud.

Shapiro v. Merrill Lynch Pierce Fenner & Smith, Inc., 495 Fed. 2d 228, which Sloan claims has changed the law, does not help his position. The Court therein stated:

> "The proper test to determine whether causation in fact has been established in a non-disclosure case is whether the plaintiff would have been influenced to act differently than he did if the defendant had disclosed to him the undisclosed fact" (p.239), citing List v. Fashion Port, supra.

In the instant case, Sloan would not have acted differently than he did because of any disclosures or absence of disclosures. He was in the business of selling short and acted

on the basis of his allegedly inside knowledge without regard to disclosure by defendants.

POINT III

THE COURT BELOW CORRECTLY HELD THAT SLOAN WAS NOT ONLY NOT A VICTIM OF ANY FRAUD BUT SOUGHT TO CAPITALIZE ON THE ALLEGED FRAUD AND MAY NOT THEREFORE BE PERMITTED TO ASSERT A CLAIM FOR SUCH FRAUD.

The admissions by Sloan that he knew all the time that information disseminated by CJV and its officers, published in the media named as defendants, was false, shows that he could not possibly have been a victim of such fraud. As a short seller, he sought out a company which he believed would earn him profits by his selling shares he did not have and repurchasing them when the market declined. Manifestly, he took upon himself, eyes open, the risks inherent in such a gamble.

Kuhnert v. Texstar Corporation, 412 F. 2d 700 (Fifth Circuit 1969) and Chriscraft Industries, Inc. v. Independent Stockholders Committee, 354 F. Supp. 895, were both cited by the decision below in support for the proposition that one using another's fraud for his personal advantage has no claim under the Securities Act of 1933 or under the Securities Ex-

change Act of 1934, when that fraud is later exposed.

Sloan has attempted to distinguish these cases by alleging that he did not go to Panama to examine CJV's copper drilling site until after he had sold short. However, this ignores his prior admission that he knew that the reports being disseminated were wrong and therefore he was a short seller of Javelin's shares (A-258).

Sloan's contention that the "unclean hands" doctrine should not be applied to him is, in effect, a request that he be permitted, at a time when he claims he knew of the perpetration of an alleged fraud which could damage numerous persons, to capitalize on his private knowledge, keeping it secret, and to be made good his losses when the market, to which he failed to disclose his secret knowledge, failed to react as he wished.

The Sloan argument that the unclean hands doctrine is only applicable where equitable relief is requested has been repudiated by Kuhnert v. Texstar Corporation, supra, and by Gandiosi v. Mellon, 269 Fed 2d 873 (3rd Cir.1959)cert den. 361 U.S. 902, 80 S. Ct. 211. These cases hold that unclean hands are a bar to relief in a private suit for violation of provisions of the Securities Acts.

CONCLUSION

THE DECISION, ORDER AND JUDGMENT BELOW SHOULD BE AFFIRMED.

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF NEW YORK

Judy L. O'Neil *being sworn, says: I am not a party to this action; I am over 18 years of age; I reside at* Bronx, New York

On September 19, 1975 *I served* 2 copies *of the within* Brief for Appellees, Canadian Javelin Ltd. et al *upon* Samuel H. Sloan, Plaintiff-Appellant,

~~the attorney(s) for~~ *in this action, at* 917 Old Trents Ferry Road, Lynchburg, Virginia *the address designated by* ~~said attorney(s)~~ *for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.*

Judy L. O'Neil

Type or Print Name Below Signature

Sworn to before me

this 19th *day of* September *19* 75.

IRVING L. GOLOMB
Notary Public, State of New York
No. 60-4626000
Qualified in Westchester County
Term Expires March 30, 1976